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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Regulatory Requirements for	)	CC Docket No. 01-337
Incumbent LEC Broadband	)	
Telecommunications Services	)	

COMMENTS OF EARTHLINK, INC.

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EarthLink, Inc., by its attorneys, files these comments on the December 20, 2001 Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1] Respectfully, EarthLink urges the Commission to maintain the current regulatory framework for the Incumbent local exchange carrier ("LEC") provision of wholesale DSL and other advanced services to competing unaffiliated Internet service providers ("ISPs").

Introduction and Summary

EarthLink is the nation's largest independent ISP in the country, with 471,000 broadband Internet access subscribers among its approximately 4.8 million total subscribers. Since 1998, EarthLink has actively pursued the rollout of broadband services via DSL, including wholesale DSL provided by Incumbent LECs. Today, there are hundreds of thousands of American consumers that use EarthLink's DSL-based Internet services, and EarthLink is enjoying aggressive growth of its broadband subscriber base. EarthLink and a lot of ISPs bring broadband home to the American consumer.

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[1] Notice of Proposed Rulemaking, CC Dkt. No. 01-337, FCC 01-360 (rel. Dec. 20, 2001).

EarthLink urges the Commission to maintain the regulatory framework for Incumbent LECs' provision of wholesale advanced services to ISPs. A careful consideration of the wholesale DSL market shows that unaffiliated ISPs providing broadband Internet are substantially reliant upon the Incumbent LECs' wholesale DSL services. The Incumbent LECs offer these services under tariff, under today's regulatory requirements, with no demonstrated harm to their ability to deploy new service offerings. Indeed, both the FCC and the Commerce Department broadband studies demonstrate that deployment of broadband transmission is not the issue impeding consumer adoption of broadband services.

Rather, consumer demand for broadband will follow when more consumers get greater value out of available applications and functionalities. The consumers' ability to choose ISPs and Internet applications depends vitally on the consumers' ability to connect and communicate with a range of ISPs via the broadband transport service. Intramodal competition – competing ISPs and Internet services offering consumers a range of services via a DSL connection – has been the catalyst driving the Internet thus far and it is the key to the next set of broadband "killer applications." Without an open telecommunications platform between consumers and Internet entrepreneurs there is diminished incentive to innovate and no mechanism for ISPs to use their creativity to stimulate consumer demand. If the ISPs of Incumbent LECs promise and deliver the broadband applications that consumers demand, then they deserve every benefit that follows from that. The regulations under consideration here, however, will determine whether the Incumbent LECs *can stop* thousands of other ISPs from also investing in and delivering potentially a thousand other broadband applications that consumers may demand.

EarthLink believes that Section 10 of the Act does not permit the Commission to forbear from regulating Incumbent LEC advanced services, especially ADSL services sold on a wholesale basis to affiliated and unaffiliated ISPs. In 1998, the FCC's *Advanced Services MO&O* flatly rejected SBC's attempt at forbearance, and there is no basis for reversing now. Indeed, the Commission should carefully analyze the wholesale DSL market that exists today where the Incumbent LECs maintain significant market control. As the FCC has explained, wholesale DSL is demonstrably a different service and market from the retail DSL or retail broadband Internet access market. Thus, faced with a dominant carrier, the appropriate regulatory response should be to require tariffing and tariff review, to demand cost justification of rates, and to scrutinize for anticompetitive activities. Without this, Incumbent LECs have every incentive and ability to stall and foreclose intramodal competition among ISPs, leaving consumers without Internet service choices.

Perhaps as much as any other ISP, EarthLink understands the dynamics of cable access. It is today offering a high-speed Internet service using AOL-Time Warner's cable facilities in several markets. This does not, however, mean that inter-modal competition is a reality. Unlike other services, consumers cannot readily switch between cable and DSL platforms without difficulty and expense. Moreover, in the vast majority of communities, cable operators do not offer consumers ISP choice. Thus, competition between DSL and cable is not yet ripe, and certainly does not justify an anti-consumer change in DSL regulation. The financial instability of the data competitive LEC ("DLEC") market also fails to offer adequate or effective competition with Incumbent LECs.

Likewise, the language of Section 10 of the Act contemplates a limit on the Commission's reliance on intermodal competition between DSL and cable at this time.

Specifically, the Section 10(b) competitive analysis is meant to examine whether forbearance would "promote competition among providers of telecommunications services." If, according to the Commission, cable operators are not "telecommunications service" providers, then reliance on competition between DSL and cable as a basis for forbearance would be questionable under the statute, especially where the forbearance would harm competition between DLECs and Incumbent LECs.

Intramodal competition will drive demand for broadband transport. As such, the Commission should ensure rights of nondiscriminatory and fair access between ISPs and consumers. Diminishing safeguards that promote intramodal competition, as are under consideration here, are not in the consumers' interests. Ultimately, consumers are best served through FCC policies that promote intramodal competition and that encourage real competition and consumer choice across transport platforms. Only then is it appropriate for the Commission to forbear, for only then will competition truly allow the market to serve the public's interest.

Discussion

I. INCUMBENT LECS PROVIDE WHOLESALE BROADBAND TRANSPORT SERVICES IN TODAY'S MARKETPLACE.

In today's broadband marketplace, there are two related but distinct services: (1) high-speed Internet access ("HSIA") services provided by ISPs and sold to retail consumers and businesses; and (2) wholesale broadband transport services sold by LEC telecommunications carriers to ISPs. To understand how broadband services are actually delivered to the American consumer, it is critical to recognize both the distinctions and the relationship between these two very different markets. A regulatory shift affecting the market for wholesale broadband transport services, for example, would have direct and likely unalterable consequences for competitive

conditions in the HSIA market that serves American consumers. As discussed below, the Incumbent LECs are today the predominant providers of wholesale broadband transport services in most places and, in some places, the only providers.

A. The Retail Market: ISPs Sell HSIA to Consumers Via Wholesale Broadband Transport Services.

The retail broadband Internet access market, which is well known to American consumers, consists of ISPs (sellers) and residential and business consumers (purchasers) of high-speed Internet services. By any measure, there is a high degree of competition among ISPs vying for market share of retail services. First, there are thousands of ISPs in the narrowband and broadband Internet access markets in the U.S. today, and almost all American consumers have a choice of several ISPs. As discussed further below, the market is so competitive that, in addition to larger national ISPs such as EarthLink, AOL or MSN, there are also a host of smaller ISPs, regional ISPs and ISPs that cater to almost any group in American society. The overwhelming majority of ISPs do not also own local access facilities nor are they affiliated with carriers, and so ISPs are able to provide service largely through the common carrier telecommunications services of Incumbent LECs and competitive carriers.

Some HSIA ISPs are also affiliated with carriers. The ISPs of competitive carriers, for example, often also provide HSIA services, such as WorldCom's UUNet and AT&T's WorldNet. Similarly, Incumbent LECs have a significant presence in the HSIA ISP market, including: SBC's Prodigy, SBCIS, PacBell Internet (PBI); Verizon's Verizon.Net; Qwest's Quest.net and its offering with MSN; BellSouth's BellSouth Internet Services.[2]

[2] As the Commission has noted, these carriers may supply some or all of the telecommunications services needed to support the retail services of the carrier's affiliated ISP. Even these carrier-affiliated ISPs generally rely on the telecommunications services provided by a host of

As discussed more fully below in Section I(B), the HSIA services offered to consumers are measurably distinct from the services offered by Wholesale broadband transport providers. HSIA services include a host of ISP functionalities, such as email, web-hosting, web-browsers, cached information (including weather, local information, national news, entertainment, etc.), music and video downloads. As a pure transmission service, of course, wholesale broadband transport provides none of these qualities and features to consumers. Indeed, even a retail DSL connection (assuming consumers in fact can acquire these services from Incumbent LECs) would provide mere transport from the end-user's DSL modem to the DSLAM facilities and no more (i.e., no Internet access, content, etc.).

Significantly, the ISPs in the HSIA market have the direct relationship with the consumer and the ISPs devote substantial time and resources to spur the broadband demand by consumers. The ISPs introduce new broadband service offerings, and engage in the promotion and marketing of innovative services for broadband applications. ISPs also guide their narrowband ISP customers through the sometimes-frustrating process of upgrading to broadband services.

No ISP is regulated by the FCC, including those affiliated with an Incumbent LEC provider of wholesale broadband transport.[3] Thus, all ISPs with equal access to the underlying

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telecommunications carriers. Indeed, in a general sense, every ISP relies on the premise of open-architecture and interconnection between telecommunications networks in order for the Internet to be the "network of networks" that it is today.

[3] *Third Computer Inquiry*, Report and Order, 104 F.C.C. 2d 958 (1986) ("*Computer III*") (BOCs may offer unregulated enhanced services so long as BOC transport services and network elements comport with comparably efficient interconnection (CEI), open network architecture (ONA), and other nonstructural safeguards); *In the Matter of Wireline Services Offering Advanced Telecommunications Capability,* Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd. 24011, ¶ 37 (1998) (*"Advanced Services MO&O"*) (BOC may use xDSL services for unregulated ISP services so long as the BOC is in compliance with *Computer III* safeguards).

telecommunications services can compete for customers on the basis of the HSIA ISP characteristics and service quality that consumers demand.

B. The Wholesale Market: Incumbent LECs Sell Wholesale Broadband Transport Services to ISPs.

Each of the major Incumbent LECs -- SBC, Verizon, BellSouth, and Qwest -- offers as a telecommunications service the provision of wholesale broadband transport to ISPs throughout the country. Each of these Incumbent LECs currently offers the wholesale broadband transport under federal access tariffs.[4] The wholesale service is a "telecommunications service:" it is offered to the public (unaffiliated and affiliated ISPs), "for a fee," and it provides transport from the end-user's NID to the Incumbent LEC's DSLAM located in the nearest central office (typically through a line-sharing arrangement, whereby the data service occupies the high-frequency portion of the POTS line).[5]

These services are generally offered on a volume basis and are designed specifically for use as an input to ISP HSIA service. For example, SBC's current tariff makes clear: "Wholesale DSL Transport Service is intended primarily for Internet Service Providers."[6] As the Commission precedent reflects, these wholesale broadband transport services have been offered

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[4] SBC Advanced Solutions Inc., Tariff F.C.C. No.1, § 6 ("Wholesale Digital Subscriber Line Transport"); Qwest Corp., Tariff F.C.C. No.1, § 8.44; BellSouth Tariff F.C.C. No.1, § 7.2.17; Verizon Advanced Data Inc., Tariff F.C.C. No.1, § 5, Part III ("Verizon Infospeed DSL Solutions").

[5] 47 U.S.C. § 153(46) (definition of "telecommunications service"); *Advanced Services MO&O*, ¶ 35 (advanced services, including xDSL services, are "telecommunications services" under the Communications Act).

[6] SBC Advanced Solutions Inc., Tariff F.C.C. No.1, § 6.1.1. *See also*, BellSouth Tariff F.C.C. No.1, § 7.2.17 ("BellSouth ADSL service is intended as an industrial offering that is made available to Network Service Providers for provision of high speed data service to their customers").

by Incumbent LECs since 1998.[7] Since then, the services have been offered by each of the Incumbent LECs on a common carrier basis, and have been the basis of the emerging retail services of high-speed ISPs. As the Commission stated in the *Advanced Services Second R&O*, "we conclude that advanced services sold to Internet Service Providers under the volume and term discount plans [of Incumbent LECs] described above are inherently and substantially different from advanced services made available directly to business and residential end-users. . . ."[8]

Significantly, the Incumbent LEC DSL service is either not offered for retail consumption or, even when it is offered, consumers cannot buy it as a practical matter. As SBC noted in its recent Missouri/Arkansas Section 271 application, after the SBC-Ameritech merger was completed, it "decided to discontinue selling the DSL transport service to residential customers. It had reached the business decision no longer to provide a retail DSL transport service directly to end users but to focus, instead, on the wholesale provision of DSL transport to ISPs."[9] In fact, to EarthLink's knowledge, the Incumbent LECs sell almost no broadband transport *at all* to retail consumers. [10] Rather, the Wholesale broadband transport offering is

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[7] *In the Matter of GTE Telephone Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd. 22466 (1998).

[8] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237, ¶ 8 (1999) (*"Advanced Services Second R&O"*).

[9] *Brief in Support of Joint Application by Southwestern Bell for Provision of In-Region, InterLATA Services in Arkansas and Missouri*, CC Dkt. No. 01-194 at 51-52 (filed Aug. 20, 2001).

[10] Indeed, selling broadband transport (without an information service) would provide consumers a relatively meaningless offering – a connection to the incumbent LEC's DSLAM only. Data

meant as an input for ISPs; the ISPs, in turn, sell HSIA services to the retail market. As the Commission recently explained to the D.C. Circuit, the Incumbent LECs' sale of volume-based DSL services to ISPs, "in turn, would allow ISPs to package affordable DSL-based-Internet services to residential and business end-users, and advance the goal of Section 706 to encourage deployment of advanced telecommunications capability to all Americans."[11]

EarthLink, like other HSIA ISPs, purchases Wholesale broadband transport services on a wholesale basis predominantly from Incumbent LECs (although EarthLink does also purchase wholesale DSL from competitive LECs). To EarthLinks' knowledge, other HSIA ISPs purchase transport substantially in this same manner. Thus, even ISPs affiliated with Incumbent LECs purchase the telecommunications service out of the Incumbent LEC tariffs. National ISPs like EarthLink and others rely heavily upon Incumbent LEC Wholesale broadband transport as an input to deliver broadband service throughout the country.

C. Other Providers in the Wholesale Broadband Transport Market.

Incumbent LECs are the predominant providers of Wholesale broadband transport services to HSIA providers in the market today. EarthLink offers its assessment of the state of other providers, and potential providers, of Wholesale broadband transport below.

1. Cable Operators – EarthLink is perhaps the most active unaffiliated ISP participant in cable "open access" in the country. EarthLink was one of three unaffiliated ISPs to obtain high-speed access to end-users via the AOL Time Warner systems, primarily as a result of

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communications across DSL then requires a second leg: the data is sent to another aggregation service – typically ATM or Frame Relay – purchased by the end-user's ISP.

[11] Brief of the Federal Communications Commission, D.C. Cir. Case No. 00-1144, at 9 (filed Dec. 22, 2000) (FCC's brief in support of the appeal of the *Advanced Services Second R&O*, 14 FCC Rcd. 19237 (1999)).

the FTC's AOL-Time Warner merger conditions.[12] As of the fourth quarter 2001, EarthLink rolled out its High-Speed Internet Access Service to 18 additional Time Warner Cable markets to complete the first phase of deployment of its landmark open access agreement. By the end of 2001, approximately 15 million homes passed in 20 Time Warner Cable markets could access EarthLink's award-winning Internet service and its full package of high-speed Internet access, content, applications and functionality. Significantly, however, even if EarthLink were to obtain access to 100% of the Time Warner Cable customer base, this would only provide it a reach of 14.35% of the American cabled homes in the United States.[13]

Other cable operators in the U.S. do not offer any unaffiliated ISPs with commercial access arrangements to cable-based consumers. Thus, while the *Third Report* notes that "cable systems in the last mile account for 54 percent of the total high-speed lines as of the end of June 2001,"[14] a much smaller percentage of this is actually available in the wholesale market for wholesale broadband transport. While EarthLink actively pursues access arrangements with cable providers, and is in active trials with some, there are today no cable operators other than Time Warner Cable even offering any type of commercial access arrangement to EarthLink (or other unaffiliated ISPs) and its customers. This means that 85% of U.S. homes with a high-speed cable connection do not have the ability to choose their ISP – whether EarthLink, another

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[12] *In the Matter of America Online, Inc. and Time Warner, Inc.*, Decision and Order, FTC File No. 0010105, Dkt. No. C-3989 (Dec. 14, 2000).

[13] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, CS Dkt. No. 01-129, FCC 01-389, Table C-3 (rel. Jan. 14, 2002) (Time Warner has 14.35 percent of total cable MSO subscribers).

[14] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Third Report, CC Dkt. No. 98-146, FCC 02-33, at ¶ 44 (rel. Feb. 6, 2002) (*"Third Report"*).

national or regional ISP, or a specialty ISP – for their Internet access services. Rather, these customers have no choice of ISP via cable and must go with the cable operators' affiliated ISP. The consequences of that lack of choice have become glaringly obvious as a result of the @Home bankruptcy, with thousands of American consumers left without a viable alternative provider, with no email, and without even a transition path to another ISP. As Chairman Powell noted to the @Home bankruptcy court, the Commission "has a strong interest in the provision of high-speed Internet services to the American public" (citing Section 706 of the 1996 Telecommunications Act),[15] and, presumably, it has just as strong an interest in avoiding a repeat of that consumer disaster with Incumbent LEC DSL services. While bankruptcies are a fact of the free market economy, it is vital that consumers are free to choose (or reject) a service provider on the Incumbent LEC platform according to the consumer's needs.

2. Competitive LECs – A few competitive LECs (sometimes called data LECs or "DLECs") also provide Wholesale broadband transport service to ISPs, and EarthLink purchases wholesale DSL from competitive LECs. According to the *Third Report*, however, only 7 percent of DSL service arrangements are provided by DLECs in 2001.[16] Further, since the fall-out in the telecommunications sector starting in 1999, almost all of these companies have suffered insolvency, financial instability, and loss of customer base. Companies such as Rhythms, NorthPoint, DSL.Net and Prism and others that were to provision wholesale DSL transport to ISPs are today either completely out of the market or have significantly retreated from the

[15] Letter of FCC Chairman Powell to U.S. Bankruptcy Judge Thomas Carlson, In re At Home Corp. et al., at 1 (dated Nov. 29, 2001).

[16] *Third Report*, ¶ 51.

Wholesale broadband transport market.[17] Even the Verizon spin-off Genuity is under severe financial strain.[18] Covad Communications, which is perhaps the most active of all the DLECs in the market, today operates from bankruptcy and, according to its most recent releases, provides 351,000 DSL lines in service (96% of which is on a wholesale basis).[19] By contrast, SBC (just one of the large Incumbents) boasted 1,333,000 DSL lines in the fourth quarter of 2001.[20] In addition to the issues of scale, the financial turmoil of the competitive LEC market makes it difficult for ISPs to rely heavily on CLECs for the wholesale DSL input, especially since the ISP holds the relationship with the end-user customer, but the Wholesale broadband transport's demise or provisioning failures would impose severe strain on the ISP's customer relationship.

Moreover, in many cities and towns in the U.S., the competitive LECs do not provide any service at all.[21] In other towns, only part of a city may be served by competitive LECs, and people living or working in other parts of the community may be unserved entirely. These two categories include not only most rural areas and many cities and towns,[22] but it also has a socio-

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[17] Companies in the telecommunications "sector accounted for nearly half of the $45 billion of defaults in high-yield bonds in 2001." N.Y. Sunday Times, Business Section, "Will he be K.O.'d by XO? Forstmann Enters the Ring, Again," at 7 (Feb. 24, 2002).

[18] "Genuity Posts Fourth-Quarter Loss After Charges," Reuters (Feb. 7, 2002) (Genuity "stock as fallen 89 percent since June 2000, when it was spun off from GTE Corp.").

[19] "Covad Announces Fourth Quarter and Year End Operating Statistics for 2001" (Jan. 16, 2002), found at, http://www.covad.com/companyinfo/pressreleases/pr_2002/011602_press.shtml.

[20] SBC Investor Briefing, at 5 (Jan. 24, 2002), *found at*, http://www.sbc.com/Investor/Financial/Earning_Info/docs/4Q_IB_FINAL_COLOR.pdf.

[21] Forty-two percent of American communities (as reflected by zip codes) have zero or only one high-speed provider in service. *Third Report*, Appendix C, Table 9.

[22] *See*, Id. Tables 10 and 11 (showing tendency for small and rural areas to have far fewer high-speed providers).

economic component: many less affluent or poorer areas of communities are not sufficiently profitable for competitive LECs to invest in, and so are not served.[23] Thus, competitive LECs cannot generally deliver a facilities-based wholesale DSL service comparable to the Incumbent LEC.

3. Satellite and Terrestrial Wireless Providers – EarthLink believes that satellite and terrestrial wireless services are promising, but are an insignificant provider of Wholesale broadband transport in today's market. As found in the *Third Report*, satellite technology provided approximately 150,000 broadband lines and terrestrial wireless accounts for "50,000 to 150,000 high-speed lines."[24]

Satellite providers – EchoStar and DirecTV – are not currently a substitute for wireline DSL. For the most part, satellite services provide only a downstream high-speed connection and require a return channel via an analog telephone modem connection. Further, satellite services are significantly more expensive than the offerings of HSIA via DSL or cable, at approximately $50/month.

Terrestrial wireless services, such as point-to-point microwave or 3G services, are simply not a feasible service offering for Wholesale broadband transport service. The *Third Report* (¶ 55) has estimated that between 50,000 to 150,000 lines are provisioned via fixed wireless services. Moreover, fixed wireless service providers, such as Winstar and Teligent, have suffered

[23] Id., Table 12 (showing tendency for households with lower income to have lower high-speed subscribership than high-income households).

[24] *Third Report*, ¶¶ 55, 60.

serious losses and, in many cases, bankruptcies.[25] Even the top MMDS licensees, including Sprint and AT&T, have announced plans to scale back or suspend their fixed wireless operations.[26]

II. THE COMMISSION SHOULD BASE ITS DECISIONS ON THE ESSENTIAL CHARACTERISTICS OF TODAY'S BROADBAND MARKET.

As the *Notice of Proposed Rulemaking* (¶ 18, 25) notes, it is important in this proceeding to identify not only the "relevant product markets" but also "which customer classes to include within a relevant product market" and whether distinctions should be drawn "between retail markets and wholesale markets." Yet, some abstract economic studies have a tendency to misconstrue and conflate the markets for broadband services as they exist today. As the Supreme Court has noted, however, examinations of market power should be based on "economic realit[ies] of the market at issue."[27] Perhaps most significantly, SBC's economists assert that there is "no doubt that all mass-market broadband Internet access services, including, most importantly, DSL and cable modem service, are part of the same product market,"[28] and that the "[m]ass-market for advanced services are provided by . . . telephone companies."[29] This mistake

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[25] "Liquidation Could Be in Winstar's Future," Broadband Week (Dec. 11, 2001); "Turbulent Times At Teligent," Broadband Week (Nov. 15, 2001).

[26] "AT&T Bags Fixed Wireless," Broadband Week (Oct. 24, 2001); "Status of Sprint Broadband Direct," at www.sprintbroadband.com/statusFAQ.html (describing that Sprint has suspended accepting new customers for fixed wireless).

[27] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 467 (1992).

[28] Declaration of Robert Crandall and Gregory Sidak at ¶ 35 ("*Crandall/Sidak*"), *attached to*, SBC Petition for Expedited Ruling that it is Non-Dominant in Its Provision of Advanced Services And For Forbearance From Dominant Carrier Regulation Of Those Services (filed Oct. 3, 2001) ("*SBC Section 10 Petition*").

[29] *Crandall/Sidak*, ¶ 31.

of *Crandall/Sidak* is also borne out by its reliance on retail Internet access prices to demonstrate some purported similarities in the products for broadband transport.[30] Not only does this view fail to recognize the wholesale broadband transport market in which SBC is one of the largest suppliers, [31] but *Crandall/Sidak* also obscures the fact that there is a separate but related market for retail Internet access. Thus, while it is unclear what (if any) actual market *Crandall/Sidak* is describing, it is one vastly different from the current tariffed services offered by Incumbent LECs to ISPs today[32] and it contradicts SBC's statement that "it had reached the business decision no longer to provide a retail DSL transport service directly to end users but to focus, instead, on the wholesale provision of DSL transport to ISPs."[33] *Crandall/Sidak*, moreover, almost completely avoids any discussion of the way broadband services are *actually* provided to the market. Only buried in a footnote does *Crandall/Sidak* acknowledge, and casually dismiss, "[t]he fact that DSL or cable modem transport may not be sold directly to the mass market by the transport providers, but rather by ISPs who bundle the transport with their Internet access . . . ."[34]

Significantly, the *Crandall/Sidak* evidentiary focus on the retail Internet access market shows nothing of relevance to the question of whether Incumbent LECs are dominant or non-dominant in the provision of broadband transport. What it seems to discuss, by conflating the

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[30] *Crandall/Sidak*, ¶ 38.

[31] SBC Investor Briefing, at 5 (Jan. 24, 2002), *found at*, http://www.sbc.com/Investor/Financial/Earning_Info/docs/4Q_IB_FINAL_COLOR.pdf. (In 2001, SBC sold 1,333,000 DSL lines).

[32] *See, infra,* at n. 4 (incumbent LEC Wholesale DSL tariffs).

[33] *Brief in Support of Joint Application by Southwestern Bell for Provision of In-Region, InterLATA Services in Arkansas and Missouri*, CC Dkt. No. 01-194 at 51-52 (filed Aug. 20, 2001).

[34] *Crandall/Sidak*, ¶ 39 n.51.

two markets, is the evidence of pricing and market share in the retail Internet access market. That enhanced (information) services market, however, has been deregulated for all Incumbent LECs and others since the 1980's with the Commission's *Computer II/Computer III* precedent. There is no need for "deregulation" where regulation does not exist.

Even if one were to set aside the actual marketplace and accept *arguendo* *Crandall/Sidak's* proposition that DSL and cable compete in the retail market for consumers,[35] it is further mistaken to assert that such a market would provide consumers with competitive choices.

A. Consumers Cannot Exercise Competitive Choices Between DSL and Cable Providers.

SBC's contends that regulation of the Incumbent LEC DSL provider is unnecessary because the Incumbent LEC cannot exercise market power over consumers; according to SBC, raising DSL transport rates would only cause consumers to abandon DSL and choose cable, and so DSL transport rates are constrained by competition.[36] This premise of consumer decision-making is false, however, because it wholly ignores several Incumbent LEC practices and other factors constraining the consumer from exercising such a choice. *First*, many consumers may be "locked-in" under one-year or more package commitments, which carry heavy penalties if they are breached.[37] *Second*, the consumer will have already invested in DSL modem equipment and

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[35] While *Crandall/Sidak* occasionally cites to other transmission providers, such as satellite, the Commission's *Third Report* has shown that other providers of transport hold a relatively negligible share of the market. See, *infra*, at I(B)(3).

[36] SBC Petition, n. 64 ("SBC's DSL transport prices, no less than its DSL Internet service prices, are directly constrained by the retail price of cable modem service.").

[37] See, e.g., http://www.verizon.net/pands/dsl/specials/; http://www.fastaccess.com/consumer/blsc _terms_conditions.jsp; http://www.pacbell.com/DSL_new/content/0,5289,48,00.html.

installation fees and set-up time, which would be a total loss if the consumer were to abandon DSL due to a rate hike. *Third*, in switching from one delivery platform to another, a consumer would bear the enormous costs and inconvenience of being disconnected from broadband for considerable lengths of time, because consumers oftentimes have to endure considerable waiting periods for the broadband service to be installed. The recent demise of @Home makes it plain that these consumer costs and confusion can be significant. *Fourth*, since cable is a shared medium and DSL is a virtual private connection, consumers may not view the characteristics of the two platforms as completely substitutable or competitive, since each service has unique issues of privacy, security, and service quality such as assured bandwidth speeds and repair times.[38] *Fifth*, DSL and cable modem services are generally only available to the consumer if the consumer also purchases both related services – voice telephony from the Incumbent LEC and cable television service from the cable operator – creating a "buy-through" obstacle to consumer choice.

These factors in today's market prevent consumers from experiencing the benefits of true intermodal competition by switching from one platform to another. This is *not* a market in which consumers can easily make a preference change by "voting with their feet." For example, the fact that there are two grocery stores in a given community offering the same produce may mean that one grocer cannot raise the price of lettuce without suffering serious competitive consequences, because consumers can respond by easily taking their business to the other store; that is, the consumer's "grocery cart" fits in either store. Similarly, in some telecommunications markets,

[38] As the NPRM (¶ 30) notes, intermodal competition across technologies can interfere with competitive assumptions: "the interplay between competitors that use different delivery platforms in the context of broadband services merits closer examination."

such as long-distance, if AT&T were to raise its interstate calling rates, consumers could easily switch to another cheaper provider, such as Sprint or MCI WorldCom, through a relatively effortless "equal access" and Letter Of Agency process. By contrast, switching between the DSL and cable broadband platforms entails a considerable amount of consumer knowledge, expense, and saintly patience. There is no "hot cut," "equal access" or even interconnection between these platforms.[39] In other words, the consumer can't just bring his grocery cart to either store. Thus, even if one accepts that there is a retail market between cable and Incumbent LEC DSL, the effectiveness of competition to act as the consumer's best protection against unreasonable pricing or practices is severely limited, at best.

B. A Market of One or Two Providers Does Not Provide Consumers With Competitive Choices.

Intermodal competition between Incumbent LEC and cable services today is not a sufficient basis under Section 10 of the Act to find that competition would serve the public interest or will protect consumers.[40] The SBC Petition, however, essentially proposes that the Commission find that a market of two providers, a "duopoly," is sufficiently competitive to warrant a finding of non-dominant status for one such participant and to justify a significant change in regulation.[41] EarthLink asserts that this proposition is wholly unsupported. The Commission has never found that a duopoly would warrant a departure from dominant carrier regulation. Thus, for example, when the FCC established a duopoly of cellular licenses prior to

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[39] While *Crandall/Sidak* asserts that SBC's DSL experiences a high "churn" rate, it offers no evidence whether the "churn" represents customers switching from DSL to cable or whether it is just customers dropping DSL entirely and not switching to cable. *Crandall/Sidak*, ¶ 68.

[40] 47 U.S.C. § 160 (a)(2) & (3).

[41] *SBC Section 10 Petition*, at 38-41.

the introduction of PCS, the Commission's regulations were designed to address the noncompetitive hallmarks of duopoly.[42] Indeed, even if one were to apply the U.S. Department of Justice's measure of market concentration (and assuming, *arguendo*, the geographic market assumptions and the market concentration figures presented by SBC), the Herfindahl-Hirschman Index (HHI) index would indicate a highly concentrated market in SBC's region that is not competitive.[43]

Finally, even SBC notes that 10% of residential homes have access via DSL but not via cable modem service.[44] While EarthLink believes that the percentage of homes accessible only via DSL may be higher than SBC asserts, this is nonetheless a staggering number of American consumers who will face no reasonable ability, at all, to choose cable over the Incumbent LEC's DSL service.

III. ISP CHOICE AND COMPETITION HAVE BEEN THE CORNERSTONES OF INTERNET GROWTH AND PRODUCTIVITY.

In considering issues regarding domestic broadband telecommunications services, the FCC cannot ignore the central role of ISPs in bringing choice and competition to consumers. Certainly, the importance of ISPs in making the narrowband Internet accessible to the mass

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[42] *In the Matter of Implementation of Section 6002(B),* First Report, 10 FCC Rcd. 8844, ¶ 4 (1995) ("duopoly nature of cellular service makes it less than fully competitive"); *In the Matter of Implementations of Sections 3(n) and 332 of the Communications Act,* Second Report and Order, 9 FCC Rcd. 1411, ¶ 138 (1994).

[43] http://www.usdoj.gov/atr/public/guidelines/horiz_book/15.html; *Crandall/Sidak*, ¶ 55. Indeed, if one were to look at the California market, for example, SBC's market share of 43% and cable's market share of 34% produces, on its own, an HHI measure of 3005, well beyond the 1600 HHI measure of a "highly concentrated market."

[44] *Crandall/Sidak*, ¶45 n. 65.

market – and in providing the foundation for Internet commerce – cannot be overstated.[45] Just as ISPs introduced consumers to the possibilities of the Internet, including e-mail, instant messaging, personalized information access, customer-driven content and other features, it is ISPs that are bringing broadband to consumers and ISPs that will help drive deployment, penetration and competition. In short, ISPs are vital to attaining the FCC's articulated goals. As the Commission has found, ISP DSL-based services will enable "affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services."[46]

Today, not only is EarthLink aggressively winning new broadband customers,[47] there are thousands of ISPs, large and small, regional and national, all of which bring their particular flavor and style to consumers.[48] For example, there are ISPs that cater to foreign-language speakers,[49] to political and religious beliefs, [50] or to individuals with non-traditional sexual

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[45] *See e.g.,* Shane Greenstein, Commercializing of the Internet: The Interaction of Public Policy and Private Choices, National Bureau of Economic Research, April 11, 2000 <http://www.kellogg.nwu.edu/faculty/greenstein/images/htm/Research/Internet-nberpolicy.pdf>; Oxman, J., OPP Working Paper No. 31, The FCC and the Unregulation of the Internet (July 1999).

[46] *Advanced Services Second R&O,* ¶ 3.

[47] Saul Hansell, Demand Grows for Net Service at High Speed, N.Y. Times, December 24, 2001, at C1.

[48] ISP World, Find an ISP, <http://www.ispworld.com/public/ispsearch/searchStart.jsp>.

[49] *See e.g.,* <http://www.latinfam.com>; <http://www.russiannation.com>.

[50] *See e.g.,* <http://www.justcatholic.net>; <http://www.christian-net.com>.

orientations.[51] ISPs also service diverse aspects of American life and commerce: some focus on small-business consumers,[52] others serve larger business,[53] and still others serve rural communities and needs.[54] Moreover, content is not the only distinction among ISPs – consumers may prefer a greater or lesser degree of e-mail functionality, complexity of features (e.g., audio or video features), technical flexibility, pricing plans or other non-content service aspects.

Consumers not only select ISPs in light of the ISPs' format, services and scope, they are keenly aware that they have a choice. If consumers become dissatisfied with service quality, content or any other aspect of an ISP's Internet access, they may switch providers, which helps keep all ISPs quality-conscious and stimulates innovation.[55] Notably, no single ISP – including the Incumbent LEC-affiliated ISPs – meets all of the needs of our diverse citizenry.[56] It is this array of ISP options that well serves the public's interest.

Today, the range and diversity of ISPs continue to reflect the diversity and breadth of consumer interests and tastes, which is precisely why they are the critical link in stimulating consumer demand and meeting consumer interests. Both the FCC and NTIA have concluded that

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[51] *See e.g.,* <http://www.gay.isp.com>; <http://www.outlink.com>.

[52] *See e.g.,* <http://www.aaccessusa.com>; <http://www.speakeasy.com>.

[53] *See e.g.,* <http://www.msn.net>; <http://www.att.net>.

[54] *See e.g.,* <http://www.etv.net/www/>; <http://www.cswnet.com>.

[55] Lisa Pierce, What the cost of customer churn means to you, November 11, 2001, <http://www.nwfusion.com/columnists/2001/1112eye.html>.

[56] Indeed, Incumbent LEC -affiliated ISPs were relatively late in their focus on the Internet access business, aggressively pursuing it only in recent years. SBC Press Room, "SBC Completes Tender Offer For Prodigy Stock" (Nov. 2, 2001), *found at,* <www.sbc.com/press_room/1,5932,31.oohtml?query=20011102-01.

broadband capabilities are being timely and reasonably deployed.[57] Yet, the 12% consumer penetration rate for broadband services[58] may reflect a "demand" issue – consumers may not yet see the value in broadband in the absence of the elusive "killer application." Here too, ISPs have an essential role. The diversity of ISPs can, as a whole, take more risks, support more applications, and experiment to a greater degree than could any single ISP, especially a single Incumbent LEC-affiliated ISP. Whether through novel marketing campaigns that target known consumer interests or an array of consumer-driven services that meet the needs and desires of the ISP's customer base, ISPs are in the best position to generate consumer interest in broadband. As is often recognized, consumer demand and deployment are part of the same deployment cycle.[59]

IV. INCUMBENT LECS HAVE MARKET POWER OVER WHOLESALE BROADBAND DATA TRANSPORT.

The Commission's *Third Report* found that, "Incumbent LECs serve approximately 93 percent of ADSL subscribers, while the competitive LECs serve about 7 percent," and "Incumbent LECs added customers at a faster rate than competitive LECs between the third quarter of 2000 and the third quarter of 2001."[60] Recent Incumbent LEC data on DSL sales confirms that Incumbents are significant facilities-based providers of DSL in their respective in-

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[57] *Third Report* supra; U.S. Department of Commerce, Economics and Statistics Administration, and National Telecommunications and Information Administration, A Nation Online: How Americans Are Expanding Their Use of the Internet, (February 2002), *found at,* < http://www.ntia.doc.gov/ntiahome/dn/anationonline2.doc> (*"A Nation Online"*).

[58] *See e.g., A Nation Online*, at 2.

[59] *See e.g.,* Chairman Michael K. Powell, Address at the National Summit on Broadband Deployment (October 25, 2001).

[60] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Third Report, FCC 02-33, CC Dkt. No. 98-146, at ¶ 51 (rel. Feb. 6, 2002) (*"Third Report"*).

region territories.[61] It is important to note that, in EarthLink's view, the market must be defined locally because the relevant inquiry is whether a given consumer or ISP in a town or locality has access to competitive alternatives or not. Put differently, it does little good to a consumer that on one side of town or in a neighboring locality there exist intermodal alternatives, when the consumer has no choice.

Incumbent LECs have the ability to raise their rival ISPs' costs, through their control over the Wholesale broadband transport market. Incumbent LECs also have the ability to engage in "price squeeze" activities by raising wholesale DSL inputs and yet maintaining retail HSIA prices. Notably, the success of Incumbent LECs' ISP services strongly suggests that Incumbents engage in just these activities. SBC, for example, claims to have sold 80% of its wholesale DSL through its affiliated ISPs,[62] making it a commanding market leader in both the retail market for HSIA and the wholesale DSL market with the ability to engage in such price squeeze activity.

Indeed, Incumbent LEC practices demonstrate that they not only can but they will raise prices and raise rivals costs. SBC, for example, recently introduced a unilateral Wholesale

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[61] SBC had 1,333,000 DSL lines in the fourth quarter of 2001; Verizon had 1.2 million DSL customers in the fourth quarter; Qwest had 448,000 DSL lines at the end of 2001; BellSouth had 620,500 "retail and wholesale" customers for DSL. SBC Investor Briefing, at 5 (Jan. 24, 2002), *found at*, http://www.sbc.com/Investor/Financial/Earning_ Info/ docs/4Q_IB_FINAL_ COLOR.pdf. "Verizon Communications Reports Solid Results for Fourth Quarter," *found at,* http:// investor.verizon.com/financial/quarterly/VZ/ 4Q2001/index.html; "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," *found at,* http://media.coporate-ir.net/media_files/NYS/q/q_1_28_02earnrel. htm; "BellSouth Reports Fourth Quarter Earnings," *found at*, http://bellsouthcorp.com/ proactive/newsroom/ release.vtm?id=38903.

[62] SBC Investor Briefing at 4 (April 23, 2001), *found at*,<www.sbc.com>.

Broadband Transport price increase of more than 16%.[63] Similarly, in May 2001, BellSouth increased its recurring charges on wholesale DSL from $29 to $33 per service arrangement and increased its nonrecurring rates substantially.[64] These rate hikes were imposed even though the carriers had previously justified the rates as cost-based, and even though the cost of providing DSL is declining.

Moreover, Incumbent LECs control other services and components essential to both ISP competition and to alternative DLEC operations. It is well established that Incumbent LECs hold monopoly control over the essential components necessary for DSL provisioning, including control over loops and central office collocation space.[65] Thus, they have the ability to retard and inhibit new entry of DLEC competition. Incumbent LECs also control the Operations Support Systems ("OSS") that ISPs must use to order wholesale DSL services.[66] Moreover, Incumbent LECs also control essential backhaul facilities, such as ATM and Frame Relay, which ISPs purchase to provide end-to-end HSIA service. Incumbent LEC practices regarding these related services can also impede high-speed Internet access competitors. In EarthLink's experience, for example, Incumbent LECs are slow to provision high-speed connections to ATM/Frame Relay services, or may charge excessive rates, keeping competition out of or slowed into new markets. Further, Incumbent LEC conditions on ATM or Frame Relay services can unnecessarily raise

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[63] Tariff F.C.C. No. 1, SBC Advanced Solutions Inc., effective Sept. 10, 2001, and See footnote 71, infra.

[64] See, infra, at footnote 70.

[65] *Advanced Services MO&O*, ¶¶ 28-31.

[66] *Deployment of Wireline Services Offering Advanced Telecommunications,* Third Report, 14 FCC Rcd. 20912, ¶¶ 99, 120 (1999) (FCC notes the "substantial operational similarities" between ISP and competitive CLEC OSS).

rivals costs, such as by imposing unusually low load requirements on high-capacity lines that are not justified and forcing competitive ISPs to purchase excessive circuit connections.

V. CURRENT WHOLESALE DSL TRANSPORT REGULATION SERVES A VITAL ROLE IN PRESERVING CONSUMER ISP CHOICE.

The existing regulatory regime for DSL transport services, whereby Incumbent LECs are subject to rate regulation, tariff filing and non-discrimination requirements, has been successful in creating today's vibrant, competitive ISP market that affords consumers with a multitude of choices. The premise of these requirements is that the ISP market will best flourish when all ISPs have non-discriminatory access to cost-based telecommunications service inputs and network functionality on tariffed rates and terms.[67] Indeed, the FCC has long understood that a regulatory mechanism is needed to ensure that the market is not unfairly skewed by Incumbent LEC - affiliated ISPs – whether through unlawful cross-subsidization or illegal discrimination.[68]

Most important is the tariff filing process, which requires advance notice (usually 15 days) and pre-effective review of tariff changes and submissions so that affected parties and FCC staff can review proposed filings. In the context of Incumbent LEC DSL services, this process has alerted ISPs, CLECs and the FCC itself to changes that would ultimately impact end-user consumers of the retail DSL-based Internet access service, including rate changes and service terms. Critically, the scrutiny of the tariff process has uncovered efforts to impose egregious terms, such as a tariff term that would allow DSL service degradation as the Incumbent LEC

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[67] See Computer III, 104 F.C.C. 2d at 1036 (incumbent LEC services should "be available on the same terms to all participants in the enhanced services market"), id., at 1040 (BOC's basic services should be tariffed and equally available for all enhanced services competitors).

[68] Id.

chooses to pursue multiple applications over the facilities used for DSL,[69] as well as rate increases for both monthly and one-time charges.[70] Not only does this process allow parties to object,[71] which can result in tariff changes that serve the public interest,[72] it allows wholesale ISP customers to adjust their business and marketing plans in light of service changes. The tariff process also affords parties the opportunity to ensure that promotional offerings and similar discounts are afforded on a non-discriminatory basis rather than used to favor the Incumbent LEC-affiliated ISPs. Moreover, under today's framework, tariff review occurs before changes become "set in stone" by the carrier.

Rate regulation – whether through the tariff review process or pursuant to price caps – also serves the public interest in ensuring that rates are cost-based and economically rational. While the FCC has generally moved away from rate-of-return regulation with its detailed ratemaking process, it has nonetheless continued to endorse cost-based rates.[73] Just as important,

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[69] *See e.g.,* Tariff FCC No.1, SBC Advanced Solutions Inc., effective September 10, 2001, at §§ 6.1.1, 6.2.4. Significantly, a subsequent tariff revision deleted these provisions after substantial opposition from affected parties and input from FCC staff. *See* Tariff FCC No.1, SBC Advanced Solutions Inc., effective February 27, 2002.

[70] *See e.g.,* BellSouth Telecommunications, Inc. ("BellSouth"), Tariff FCC No. 1, filed May 14, 2001, Transmittal No. 590. Significantly, BellSouth raised non-recurring charges 120% from $50.00 to $110.00 despite its own statements to its shareholders that costs were falling. 1st Quarter Report 2001 at <http://www.bellsouth.com/annualreport/1q01report/quarterlynews.htm.

[71] *See e.g.,* Letter of EarthLink, Inc., Competitive Telecommunications Association, U.S. Internet Service Providers Alliance, and Virginia ISP Alliance to Chairman Michael Powell, filed September 17, 2001 (objecting to numerous provisions of SBC-ASI Advanced Services Tariff FCC No. 1).

[72] *See e.g.,* Application No. 6 of SBC-ASI, filed January 30, 2002, requesting special permission to file changes to Tariff FCC No. 1, noting changes "pursuant to discussions with the Commission staff to provide clarity and clean up the initial filing."

[73] *In the Matter of Price Cap Performance Review of Local Exchange Carriers,* Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858 ¶¶ 1,2 (1995).

this regulatory structure helps to ensure that the Incumbent LECs cannot engage in an unlawful price squeeze and other anticompetitive pricing through their control of the essential DSL input to the benefit of their affiliated ISPs and the detriment of others. While some reject the premise that the Incumbent LECs could effectively engage in such a price squeeze,[74] as demonstrated above, Incumbent LECs *do* control the access facilities and services that ISPs use as a wholesale input into their retail Internet access offering. In fact, price squeeze remains a real possibility. As the D.C. Circuit recently noted, the public interest evaluation of competition in a market demands that the Commission not give the "brush off" to price squeeze issues.[75]

Certainly EarthLink does not suggest that today's regulatory regime is perfect or that it is 100% effective in preventing or detecting all instances where anticompetitive conduct is at issue. That being said, the elimination of these regulatory requirements such as through the expansive deregulation that is suggested, could impose serious negative public interest consequences. First, without mandatory tariffing, there would be little, if any, regulatory oversight of the terms and conditions of service, opening the door to massive discrimination and unfair terms and conditions. Further, even if discrimination and unjust or unreasonable terms were uncovered, parties would be left solely with the Section 208 enforcement process, which entails enormous expense and resource burdens, with proceedings stretching for years and unclear standards for resolution. Given that anticompetitive conduct exists even under the tariff process, it makes little sense to eliminate one of the few mechanisms that has worked to ensure fair competition.

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[74] See *SBC Section 10 Petition* at 73 (asserting that it could not engage in price squeeze since cable modem services are not dependent upon Incumbent LEC networks).

[75] Sprint Comm. v. FCC, 274 F.3d 549, 554 (2001).

Similarly, elimination of the public tariffing process would undermine the "equal access" rights pursuant to *Computer II* and *Computer III* that the FCC has deemed so successful.[76] Those regulatory structures are premised on publicly available tariffs to ensure non-discriminatory access to underlying telecommunications services at reasonable rates. Elimination of those requirements will gut the FCC's decisions, reversing decades of successful regulation.

Indeed, in light of the sweeping deregulation that seems to be contemplated,[77] it is unclear whether the Incumbent LECs could even withdraw the stand-alone DSL service entirely from the wholesale market, leaving ISPs without any DSL option to use to offer end-users Internet access services. While competition may one day support deregulation of the type proposed, it is far from here; under today's circumstances, the broad deregulation advocated by the Incumbent LECs would likely do little more than provide them the ability to eliminate ISP competitors without any benefits for the public.

VI. THE COMMISSION SHOULD NOT REVERSE POLICY AND THREATEN CONSUMER CHOICE OF BROADBAND ISP SERVICES.

A. Commission Precedent Establishes That Dominant Carrier Regulation of Incumbent LEC Services Serves the Public Interest.

In 1997 and 1998, the Commission deliberated on the largely same Incumbent LEC arguments that are presented in the SBC Petition and reflected in the NPRM: "four Bell Operating Companies (BOCs) request that we allow them to provide xDSL-based services in a deregulated environment."[78] At that time, the Incumbents argued, they had no market share in

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[76] *Computer III,* 104 F.C.C. 2d at 1040 (requiring tariffed offerings of BOC transmission services); FCC Office of Plans and Policy, Paper No. 31, "The Unregulation of the Internet."

[77] *See e.g., SBC Section 10 Petition.*

[78] *Advanced Services MO&O,* ¶ 9.

the nascent broadband market, and the Commission recognized that "the Incumbent does not currently enjoy the overwhelming market power that it possesses in the conventional circuit-switched voice telephony market."[79] After considerable public debate and information, however, the Commission decided in the *Advanced Services MO&O* that the public interest would best be served if Incumbent LECs were not treated to such deregulation of DSL services.[80] Indeed, the Commission expressly recognized that the Incumbent LECs were essentially asking for Section 10 forbearance, as is at issue in this proceeding.[81] Further, the Commission expressly rejected SBC's request for relief from dominant carrier "tariff filing requirements and other obligations under the Act and under parts 61 and 69 of the Commission's rules;" instead, the Commission held that "to the extent that advanced services are offered by an Incumbent LEC, we find, on the record before us, that *it is consistent with the public interest to subject such Incumbents to full Incumbent LEC regulation*."[82]

Similarly, in 1999, the Commission's *Order on Remand* found that xDSL services provided by Incumbent LECs are "telecommunications exchange or exchange access services" that are not otherwise exempt from Incumbent LEC Section 251(c) obligations.[83] The Commission rejected the contention that an Incumbent LEC offering advanced services should be subject to different regulation because it was not offering traditional voice telephone exchange or exchange access. Indeed, the Commission found no support in the 1996 Act for such

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[79] *Advanced Services MO&O*, ¶ 10.

[80] *Advanced Services MO&O*, ¶ 37 (BOC xDSL services are subject to Computer III safeguards).

[81] *See SBC Section 10 Petition* at 73-83 (requesting forbearance under Section 10 of the Act).

[82] *Advanced Services MO&O*, ¶ 79.

[83] Order on Remand, 15 FCC Rcd. 385, ¶¶ 9-14 (1999).

a distinction based on the type of service – xDSL service – being offered by the Incumbent, and found that Congress had intentionally imposed more rigorous regulatory obligations on Incumbent LECs.[84]

The Commission would be ill-advised to reverse course on this recent and well-considered precedent. The public interest in dominant carrier regulation of Incumbent LEC services remains as vital today as just a few years ago; nothing in the current market dynamics has changed the Incumbent LECs' bottleneck control over essential facilities used for the delivery of DSL services -- including local loops, central office collocation, OSS, and control over backhaul services (e.g., ATM and Frame Relay) – or the resulting wholesale ADSL services. As the D.C. Circuit has often noted, "[a]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[85] Moreover, a significant public-interest factor militating against such a regulatory change is the reliance interests of unaffiliated ISPs and their end-users, who have invested considerably in the promotion of HSIA services reliant upon the availability of Incumbent LEC transmission services.[86]

Moreover, while the NPRM (¶ 11) raises the precedent of the *AT&T Reclassification Order*,[87] there are critical distinctions between AT&T determination and the Incumbent LECs in

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[84] Id., ¶ 10, 11.

[85] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923.

[86] Omnipoint Corp. v. FCC, 78 F.3d 620, 636 (D.C. Cir. 1996) (FCC justified in declining to change regulation where businesses had reasonably relied upon it).

[87] *Motion of AT&T Corp to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271 (1995) ("*AT&T Reclassification Order*").

the market for broadband today. First, unlike AT&T, which the Commission noted no longer held the local bottleneck facilities to be used against rivals in the long distance market,[88] the Incumbent LECs today continue to own and control these bottleneck facilities. Second, unlike the finding of several robust facilities-based competitors in the market facing AT&T,[89] the Incumbent LECs have no real competitors in the Wholesale broadband transport market and, even if one assumes *arguendo* a retail DSL market, the Incumbent LEC faces only a limited degree of competition from cable, which is not fully robust for reasons discussed above.

B. Deregulation of Incumbent LEC Advanced Services Prior to Robust Telecommunications Service Competition Would Conflict with the Requirements of Section 10 of the Act.

While the NPRM raises appropriate questions regarding Incumbent LEC market power and follows on the approach of the 1995 *AT&T Reclassification Order*, Section 10 of the 1996 Telecommunications Act now requires the Commission to consider additional and somewhat different factors.[90] Section 10(b), for example, requires that "competitive market conditions" be only one factor, among others, for the Commission to review in determining whether forbearance is in the "public interest" under Section 10(a)(3).[91] Given that access to a consumer's choice of ISP and Internet services is certainly a relevant "public interest" factor, confining the Section 10 examination to only – a market analysis review especially one that rests on predictions of the future state of competition – is wholly inadequate.

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[88] *AT&T Reclassification Order*, ¶ 32.

[89] Id., ¶¶ 58-59.

[90] 47 U.S.C. § 160.

[91] Id., § 160(a)(3).

Further, Section 10(b) requires the Commission to examine whether forbearance would "enhance competition among providers of telecommunications services" when it weighs the "public interest" factors of Section 10(a)(3). Since the Commission has not found that cable operators are providers of "telecommunications services," however, the use of cable broadband market data, and the competitive effects on intermodal competition between DSL and cable, would be at odds with the plain language of Section 10(b).[92] Indeed, as applied to broadband telecommunications services, Section 10 would appear to require the Commission to access the benefits of competition between Incumbents and DLECs.

Section 10 also requires the Commission to examine whether such regulation "is not necessary for the protection of consumers,"[93] which is more than just an exercise in theoretical economic forecasts. Rather, as discussed above, there are serious issues of whether consumers are protected in a deregulated environment if Incumbent LEC DSL is their only transport option, if consumers cannot viably switch from one broadband platform to another, and if consumers cannot reach the Internet services of their choice due to anticompetitive or unreasonable practices of the Incumbent LEC.

While consumers may be served by intermodal competition between several providers (when and if that competition arrives), Section 10 of the Communications Act demands the FCC ask how such forbearance will affect consumers today. Intramodal competition today between affiliated and unaffiliated ISPs operating on the same Incumbent LEC network undoubtedly gives consumers a wide array of choices and it pushes ISPs in the market to innovate new "killer

[92] Id., § 160(b).

[93] Id., at § 160(a)(2).

applications" for broadband. This is possible in today's market, however, only if ISPs can deliver the wide range of content and services to consumers via Incumbent LEC broadband transport with confidence that FCC regulations will effectively prevent Incumbent LEC anticompetitive practices. Regulatory forbearance that undercuts or even weakens the safeguards for ISPs to access their customers, however, threatens intramodal competition and diminishes consumer welfare.

Further, deregulation of Incumbent LEC tariffing and price cap regulations promises little, if any, gain for consumers. SBC, for example, has offered no evidence that it is unable to introduce new services or service features in a timely manner through the FCC tariffing process; indeed, all of the Incumbent LECs offer wholesale ADSL via the FCC's tariffing process and make frequent changes to their tariffs with little difficulty.

Moreover, the available evidence shows that Incumbent LEC ADSL services under existing dominant carrier regulation have been a remarkable success for the Incumbents. The Commission's *Third Report* and the U.S. Commerce Department's *A Nation OnLine* have both convincingly demonstrated that broadband deployment, including that of Incumbent LECs, under the current regulatory regime continues to move forward rapidly. The Commission has noted that Incumbent LECs provide 93% of the ADSL in the market, while the "deregulated" DLECs have only a 7% share, and that "Incumbent LECs added customers at a much faster rate than competitive LECs between the third quarter of 2000 and the third quarter of 2001."[94] Comparing Incumbent LEC ADSL residential and business line growth rates with those of cable, the FCC's

[94] *Third Report*, ¶ 51.

data also shows that the Incumbent LECs' growth significantly exceeds that of cable.[95] Similarly, the Commerce Department's *A Nation OnLine* shows that the rate of subscription of broadband services has been more accelerated than that of other technology adoption rates in recent history, including cellular technology, cable television, paging, and color television.[96] Thus, there would appear to be no public interest benefit to be gained by switching course on regulation of Incumbent LEC Wholesale broadband transport services, and gambling that Incumbent LECs will not use monopoly power either to contract supply of broadband transmission, increase prices on consumers, or harm the high level of competition in the ISP market.

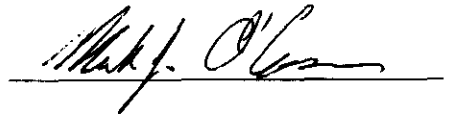
Conclusion

For the foregoing reasons, EarthLink urges the Commission to continue to encourage intramodal competition among ISPs for broadband Internet services. Maintaining the existing regulatory framework for Incumbent LEC advanced services is a necessary step, so that consumers can choose a wide array of Internet services via their DSL connection. Ultimately, EarthLink is confident that supporting intramodal competition today will encourage and support the introduction of true broadband intermodal competition.

[95] *Third Report,* Appendix C, Tables 3 and 4 (growth from Dec. 2000 to June 2001 for residential and business advanced services (over 200 kbps in one direction) was 56% for ADSL and 52% for cable, and growth for other advanced services (over 200 kbps in both directions) was 133% for ADSL and 45% for cable).

[96] *A Nation OnLine,* at 37 Figure 4-3 "Rate of Deployment of Selected Technologies."

Respectfully Submitted,

By: 

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